Supreme Court, U.S.

01 341 SEP 20 2001

No. _____

IN THE

Supreme Court of the United States

October Term, 2000

THOMAS E. TILLEY,

Petitioner,

vs.

TOWN OF ABERDEEN; J. ARTHUR PARKER; TONY ROBERTSON; GILES HOPKINS; DON WALKER; THE BROUGH LAW FIRM; WILLIAM C. MORGAN, Jr.; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS; BILL MARTS; SAMUEL W. FIELDS,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas E. Tilley
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Chapel Hill, NC 27514
Telephone: (919) 489-2263

QUESTIONS PRESENTED

I. Whether the takings, due process, equal protection, and conspiracy claims were prudentially ripe.

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals denying Thomas Tilley's appeal is not reported. The *per curiam* opinion was filed May 23, 2001, and is styled *Tilley, et al. v. Town of Aberdeen, et al.*, Appeal No. 01-1192 (4th Circuit), and is reprinted in Appendix A.

The United States District Court's Memorandum Opinion denying Thomas Tilley's Rule 59(e) motion is not reported. The opinion was filed January 16, 20001, and is styled as *Tilley, et al. v. Town of Aberdeen, et al.*, Case No. 1:98:CV00896 (M.D.N.C., January 16, 2001), and is reprinted in Appendix B.

The Order and Memorandum Opinion of the United States District Court dismissing Thomas Tilley's action as not ripe is not reported. The Order and Memorandum Opinion were filed March 30, 2000, and are styled *Tilley, et al. v. Town of Aberdeen, et al.*, Case No. 1:98:CV00896 (M.D.N.C., March 30, 2000), and are reprinted in Appendix C.

JURISDICTION

The opinion of the Fourth Circuit Court of Appeals in this case, denying Thomas Tilley's appeal, was filed on May 23, 2001. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if mailed U.S.P.S. first class, postmarked by August 21, 2001.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the following constitutional and statutory provisions:

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fifth Amendment

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Thomas Tilley filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, with the United States District Court for the Middle District of North Carolina. The civil rights action was

seeking a declaratory judgment that Plaintiffs are entitled to park mobile homes and use the current septic systems in the Carolina Mobile Home Park, and to recover lost rents, punitive damages, and costs and fees arising from violations of procedural due process, substantive due process, equal protection, in the deprivation of, and conspiracy to deprive, Plaintiffs of the use of their property.

The various Defendants filed motions to dismiss and/or for summary judgment, pursuant to Rules 12(b)(1 and (b)(6), Fed. R. Civ. P., arguing that the case should be dismissed on ripeness grounds.

By Order of March 30, 2000, the District Court granted the Defendants motion to dismiss under Rule 12(b)(1) by ruling that these claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute."

Thomas Tilley filed a Fed. R. Civ. P. 59(e) motion to alter, amend, or vacate the District Court's Order of March 30, 2000, which was denied by Memorandum Opinion filed January 16, 2001.

On appeal, Thomas Tilley argued (1) that the judgment should be vacated because the initial decision maker has made a final decision, and his claim is therefore ripe; (2) that neither the Supreme Court nor the Fourth Circuit requires exhaustion of state remedies as a prerequisite to bringing a takings action from a final decision; and (3) that the due process, equal protection, and conspiracy claims were ripe even if the takings claim was not.

The Fourth Circuit Panel issued its *per curiam* opinion on May 23, 2001, that "[w]e have "reviewed the record and the district court's opinions and find no reversible error."

This timely petition follows.

REASON FOR GRANTING THE WRIT

I. The Fourth Circuit Court Of Appeals Per Curiam Opinion That Thomas Tilley's Takings Claim Is Not Ripe For Adjudication Is In Conflict with United States Supreme Court Precedents.

The instant proceeding involves a question of exceptional importance because the Fourth Circuit Panel's/District Court's decision failed to distinguish the standard applied to a takings claim by this Court's decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), which was rendered after the Fourth Circuit's *per curiam* opinion was filed.

The lower courts rulings that the claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute," is the same error reversed by the *Palazzolo* Court.

The Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim, as the lower courts held in the instant matter, but the *Palazzolo* court held that: "The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision... ." *Palazzolo*, 121 S. Ct. at 2458.

Tilley is the trustee of Investment Trust, and owns a mobile home park originally located outside the town limits of Aberdeen, North Carolina. In 1986, the Town of Aberdeen annexed the park. When annexed, the park consisted of fifty-one sites. From 1989 through 1995, the Town, through its agents, refused to allow replacement mobile homes to be parked in twenty-five sites as they were vacated. The ground given for denying permits was that the mobile homes must hook up to the Town's sewer system.

The Town had no authority to require the mobile homes to hook up to the its sewer system.

The Town's ordinances state:

> The manufactured home park and all occupied units located in it must be connected to the municipal water and sewerage systems **or other systems** approved by the County Health Department or the State Department of Human Resources and Community Development, Division of Environmental Management.

Aberdeen Zoning Code § 155.156, passed 4-9-85.

> All developed properties in areas subsequently annexed to the town which are served by on-site septic systems **may continue to use those septic systems for a period not to exceed ten years from the date that sewer is made available** to those properties as long as those septic systems continue to be approved by the Moore County Health Department.

Aberdeen Public Works Ordinance § 50.32(D).

Because the town's public sewer system was not extended to the park until at least 1992,[1] Tilley had/has the right to use the functioning on-site septic systems until at least 2002. Tilley was never informed by the Defendants that he could appeal these decisions or how to do so.

In 1996, the Town, through its agent, adopted the position that the twenty-five lots made vacant by the above improper conduct would remain vacant, whether hooked up to the Town's sewer system or not, because the park fell within a commercial highway zone and was not a conforming use. The Town had no authority to prohibit Tilley from parking mobile homes in the park. It's ordinances state:

> Nonconforming uses. After March 10, 1975, pre-existing lots or structures, or the pre-existing uses of land or structures which would be prohibited under the regulations for the district in which it is located shall be considered as nonconforming. **It is the intent of this chapter to permit these nonconformities to continue until they are removed, but not to encourage their continued use**. Nonconforming structures or uses may be continued; provided, that they conform to the provisions of § 155.006.

Aberdeen Zoning Code § 155.005(C), passed 4-9-85.

> Extension of use. Nonconforming use of land or buildings shall not hereafter be enlarged or extended in any way.

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1. The exact date has yet to be determined because discovery was stayed pending dispositive motions.

Aberdeen Zoning Code § 155.006(B), passed 4-9-85.

> Cessation of use. **If active operations are discontinued for a continuous period of six months** with respect to a nonconforming use, such nonconforming use shall thereafter be used for a conforming use.

Aberdeen Zoning Code § 155.006(D), passed 4-9-85.

The Mobile Home Park has never discontinued operation; therefore, Tilley had/has the right to park mobile homes in the park. *In re Tadlock*, 134 S.E.2d 177, 178-80 (N.C. 1964); *In the Matter of Hensley*, 390 S.E.2d 727, 727-28 (N.C. App. 1990). Tilley was never informed that he could appeal these decisions or how to do so. All twenty-five (of fifty-one) sites remain vacant today.

The Complaint alleges that there was a conspiracy to deprive him of his constitutional rights to due process and equal protection, and that the Defendants took the park without compensation by making it impossible to operate the park profitably. The District Court dismissed these claims as not being prudentially ripe, and the Fourth Circuit affirmed in a *per curiam* opinion.

The lower courts dismissed all claims under 42 U.S.C. § 1983[2] that the Defendants deprived Tilley of property without due process of law, took the property without just compensation, violated equal protection rights by treating him

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2. All section references are to Title 42 unless otherwise specified.

differently than other property owners, and conspired to do so. The lower courts held that these claims were prudentially unripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, because Plaintiffs failed to "seek a variance or to make use of North Carolina's inverse condemnation statute."

(A) Finality Versus Exhaustion.

The Supreme Court has said that finality addresses "whether the **initial** decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County*, 473 U.S. at 193. By contrast, "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* Thus, if the purpose of the action not taken is "remedial," it is not a prerequisite to a § 1983 action. *Id.*

In *Williamson County*, the Commission denied Hamilton Bank's preliminary plat because it violated the zoning ordinance. *Williamson County*, 473 U.S. at 181. The Court held the § 1983 suit premature because Hamilton Bank did not seek a variance from the Commission, the initial decision maker. *Williamson County*, 473 U.S. at 194. The Court expressly said that if Hamilton Bank had been denied a variance, it would not have to appeal to the Board of Zoning Appeal or seek other remedies under state law before filing a § 1983 action:

> While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities,

> respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not participate in the Commission's decision making.

Williamson County, 473 U.S. at 193 (citations omitted).

The Supreme Court reiterated the limitation of the finality rule to initial decision makers when it held "the type of 'final decision' required by our *Williamson County* precedents . . . address the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of [an initial decision making] regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997).[3]

In the instant matter, the initial decision maker has made a final decision. For over a decade, the Defendants have refused to allow the replacement of mobile homes for those that move out of the park. As the Defendants denied each new request to park a mobile home, they reaffirmed their decision. This is not a case like *Williamson County* where some zoning board has re-zoned the subject property prohibiting some current or planned

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3. Also holding that a claim is not rendered unripe due to the fact that the "value" of the taking has not been determined. *Suitum*, 520 U.S. at 740-42.

use.[4] Any action before a zoning board in this case would be in the nature of an appeal because it was not the initial decision maker. The initial decision makers were the Defendants, and **their decisions** were final. Thus, Tilley does not need to seek remedial appeals of these final decisions before having ripe constitutional claims. The only question is whether those decisions were lawful.

As recently explained by this Court in *Palazzolo*:

> As we have explained, *Williamson County* and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, see *Felder v. Casey, 487 U.S. 131, 150-151, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988),* federal ripeness rules do not require the submission of further and futile applications with other agencies.

Palazzolo, 121 S. Ct. at 2462.

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4. Tilley does not need a variance from any zoning or land use law because, as shown above, Tilley's use is allowed under the applicable ordinances and laws.

(B) State Remedies.

Despite dictum in *Williamson County*, neither the Supreme Court nor the Fourth Circuit require exhaustion of state remedies as a prerequisite to bringing a takings action from a final decision. In *Washlefske v. Winston*, 234 F.3d 179, 180 (4th Cir. 2000), the Court addressed the question of whether an inmate "was deprived of his private property without just compensation" when Virginia spent the interest earned from his prison accounts for the general benefit of inmates. After holding the decision was a final one, the Court held that:

> The only question to be determined therefore is the legality of the State's program. If we were, in this circumstance, to require Washlefske to file his claim first in a Virginia court, we would be transforming *Williamson County's* finality rule into a rule of exhaustion. This result would be in diametric opposition to a foundational decision of modern § 1983 jurisprudence, *Monroe v. Pape*, which held that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).
>
> It is not surprising, therefore, that the Supreme Court, when faced with a similar claim that had reached an identical state of maturity as the claim before us, exercised jurisdiction over the claim without expressing any reservation that jurisdiction was proper. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998) (holding that clients had a protected property interest in the interest in their attorneys' trust accounts). As a

> Supreme Court plurality observed in *Eastern Enterprises*, "'while we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." 524 U.S. at 522 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).
>
> We therefore conclude that Washlefske's Taking Clause claim is sufficiently mature, defined, and immediate to be ripe for consideration within our jurisdiction.

Washlefske, 234 F.3d at 183.

In this case, the only question is also the legality of the Defendants' conduct. The claims are, therefore, ripe and the lower court's contrary holding was legal error. Consequently, the denial of the motion to alter, amend, or vacate was an abuse of discretion.

II. Whether The Due Process, Equal Protection, And Conspiracy Claims Were Ripe Even If The Takings Claim Was Not.

On an issue of first impression in the Fourth Circuit, the lower courts held the claims ancillary to unripe takings claims were also unripe. The Supreme Court has also not addressed this issue. *Suitum*, 520 U.S. at 733 n.6.

The Sixth Circuit had adopted the view that the finality rule does not apply to these claims. In *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991),

the court held:

> [A] procedural due process claim is instantly cognizable in federal court without requiring a final decision . . . from the responsible municipal agency . . . . [I]n the case of a procedural due process claim, the allegedly infirm process is an injury in itself, whereas, in the context of a takings claim, the alleged injury – a diminution in property value – cannot be assessed with any degree of certainty until the municipality arrives at a final decision as to how the property owner will be permitted to develop his property.

In *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), the court determined that an equal protection claim could be brought against a city ordinance even though the plaintiff had not exhausted its taking claims because of the holding in *Nasierowski*. In *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992), the court held that "the very existence of an allegedly unlawful zoning action, without more, makes a substantial due process claim ripe for federal adjudication."

In *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159 (6th Cir. 1992), however, the court applied the finality rule to a procedural due process claim. In so doing, though, *Bigelow* made a determination of whether the denial of due process itself produced an injury. After distinguishing *Nasierowski* as a case that brought only a due process claim, the *Bigelow* court analyzed two Ninth Circuit cases which addressed bundled claims. *Bigelow*, 970 F.2d at 159. The first case stated:

> the final decision requirement is applicable to

> substantive due process and equal protection claims . . . and is most likely applicable to related procedural due process claims.

Id. The second case, after noting that bundled procedural due process claims may be subject to ripeness requirements, clarified that ripeness does not apply to a denial of procedural due process that results in the instantaneous infliction of a concrete injury. *Id.* Summing up, the Court held:

> *Nasierowski* appears to stand merely for the sensible proposition that while different circumstances may produce different results, the final decision rule does not apply when the denial of procedural due process itself creates an injury.

Bigelow, 970 F.2d at 160.

Later panels of the Sixth Circuit have not accepted the change in law that the *Bigelow* decision sought to establish. In *Harris v. City of Akron*, 20 F.3d 1396, 1402-03 (6th Cir. 1994), the court ignored the holding in *Bigelow* as to both procedural and substantive due process claims because the case was not presented as a "taking case," but as a "pure due process case" – the taking claims having been previously dismissed on finality grounds. *Id.* The rule in *Bigelow* was also ignored by another panel of the Sixth Circuit in *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201 n.2 (6th Cir. 1993). The *Triomphe* panel noted the rule in *Pearson*, which is the rule from *Nasierowski*, and followed the rule as precedent even though in its case the substantive due process claim "was no different from an ordinary takings claim."

In light of these authorities, the issue of whether these

claims are subject to the *Williamson County* finality requirements was settled in the Sixth Circuit by the decision in *Nasierowski*. As noted in the *Seguin* decision, this determination is binding within the Sixth Circuit until either the Supreme Court issues an inconsistent opinion or the Circuit Court sitting *en banc* elects to reconsider the matter. *Seguin*, 968 F.2d at 590; *Salmi v. Secretary of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985). Accordingly, in the Sixth Circuit, substantive and procedural due process and equal protection claims may be reviewed regardless of the *Williamson County* finality requirements.

It goes without saying that if claims of constitutional violations are ripe, a charged conspiracy to commit those violations is also ripe. *Sequin*, 968 F.2d at 590.

The Tenth Circuit has also held that a procedural due process claim may be litigated despite the fact a related takings claim was unripe. In *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 719 (10th Cir. 1988), the defendants' actions were alleged to constitute a denial of plaintiff's right to procedural and substantive due process, equal protection, and just compensation for a taking; an unspecified conspiracy; and pendent state claims. The district court held that none of the claims were ripe under the finality rule. Discussing the procedural due process claim, the court held:

> There are many intangible rights that merit the protection of procedural due process although their infringement falls short of an exercise of the power of eminent domain for which just compensation is required under the Fifth and Fourteenth Amendments.
>
> Here, Del City's failure to issue the specific permits

> Landmark requested does not give rise to a ripe takings claim because this failure does not dictate the permitted level of development with sufficient finality. If Landmark had a property interest in those specific permits, however, Del City could not withhold them without affording Landmark due process. Thus Landmark's procedural due process claim may not be dismissed as unripe.

Landmark, 874 F.2d at 723 (citations omitted).

The Fifth Circuit has recently analyzed the issue and held that constitutional claims that "assert rights not protected by the Takings Clause" are "not amenable to treatment as a takings claim." *The John Corp. v. Vanguard Ltd Inc.*, 214 F.3d 573, 585 (5th Cir. 2000). After dismissing a takings claim as unripe, the court analyzed the application of *Williamson County* to due process and equal protection claims and held that a substantial due process and equal protection claim was ripe for review. *John Corp*, 214 F.3d at 581-85. The court held that a pre-taking procedural due process claim, however, fell within the takings claim. *John Corp*, 214 F.3d at 585-86. The instant post-taking procedural due process claim would be ripe under *John Corp*, however, because it asserts a right not protected by the takings clause (to wit, not to be deprived of any property, even that not constituting a taking, without due process of law).

Therefore, the better rule is that procedural and substantive due process, and equal protection, claims may be asserted in a § 1983 action because each claim asserts rights not encompassed in the Takings Clause.

Procedural due process protects Tilley from being deprived of any property without notice reasonably calculated to inform

him of the availability of an opportunity to present his objections to the Defendants' conduct. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978). This constitutional right protects Tilley before property deprivation reaches a constitutional taking. Tilley's factual and legal basis for asserting a procedural due process claim is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and Trial Brief.

Substantive due process protects Tilley from the arbitrary or capricious deprivation of any property right. *Brown-Ferris Industries v. Wake County*, 905 F. Supp. 312, 317 (E.D.N.C. 1995). The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Birch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986); see also *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223-26 (1985). Tilley's factual and legal basis for asserting substantive due process claims is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and the Trial Brief.

Equal protection protects Tilley from being treated differently by the Defendants than a similarly situated property owner without a reason rationally related to a legitimate governmental interest. *Brown-Ferris*, 905 F. Supp. at 322. Tilley's factual and legal basis for asserting equal protection claims is fully set forth in Opposition to the Aberdeen Defendants' Motion to Dismiss and the Trial Brief.

Each of these causes of action asserts rights to recovery of damages independent of the takings claim. Therefore, they are

ripe independently of the prudential ripeness analysis of *Williamson County*. Otherwise, the result will be diametrically opposed to a foundational rule of modern § 1983 jurisprudence, that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." *Washlefske*, 234 F.2d at 183. Also, conspiracy to deprive Tilley of his fundamental and procedural rights are axiomatically ripe.

These claims are, therefore, ripe and the District Court's contrary holding, affirmed by the Fourth Circuit's *per curiam* opinion, was legal error.

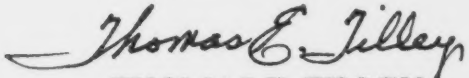
Because the District Court and the Fourth Circuit Court of Appeals failed to properly apply long and well settled law of this Court, the opinions are in conflict with the recent decision of *Palazzolo v. Rhode Island*, 121 S. Ct. 2448; 150 L. Ed. 2d 592 (2001), there is confusion in the circuit courts concerning whether causes of action asserting rights to recovery of damages independent of the takings claim, which is a first impression issue in the Supreme Court, a writ of *certiorari* should issue to correct the judgment and end the confusion.

CONCLUSION

For each and all of the above grounds, a writ of certiorari should issue.

The decisions below should be reversed.

Respectfully submitted,



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August 20, 2001.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS C. TILLEY; INVESTMENT TRUST,

Plaintiffs - Appellants,

v. No. 01-1192

TOWN OF ABERDEEN; J. ARTHUR PARKER, in his capacity as Mayor for the Town of Aberdeen, and individually; TONY ROBERTSON, in his capacity as Town Manager for the Town of Aberdeen, and individually; GILES HOPKINS, in his capacity as Planning Director for the Town of Aberdeen, and individually; DON WALKER, in his capacity as Code Enforcement Officer, and individually; THE NORTH CAROLINA DEPARTMENT OF HEALTH SERVICES, DIVISION OF HEALTH SERVICES; COUNTY OF MOORE; STEVE BIGGS, former Town Manager of Aberdeen; BILL MARTS, former Mayor of the Town of Aberdeen; and SAMUEL W. FIELDS, in his capacity as an agent of the N.C. Dept. of Human Resources, and individually.,

Defendants - Appellees.

and

THE BROUGH LAW FIRM, in its capacity as attorneys for the Town of Aberdeen; WILLIAM MORGAN, individually and in his capacity as attorney for the Town of Aberdeen,

Defendants.

Appeal from the United States District Court for the Middle

District of North Carolina, at Durham. N. Carlton Tilley, Jr., Chief District Judge. (CA-98-896-1)

Submitted: May 17, 2001 Decided: May 23, 2001

Before WIDENER, NIEMEYER, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Thomas E. Tilley, Appellant Pro Se; Knox Kent Lively, III, Greensboro, North Carolina, for Appellants. Timothy Patrick Sullivan, Robin Tatum Morris, Michelle Lee Frasier, POYNER & SPRUILL, Raleigh, North Carolina; Mabel Y. Bullock, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina; Tyrus Vance Dahl, Jr., Andrew Christian Buckner, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Thomas E. Tilley and Investment Trust appeal from the district court's orders dismissing their conspiracy, due process, equal protection, and taking claims as unripe and denying their motion for reconsideration. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Tilley v. Town of Aberdeen, No. CA-98-896-1 (M.D.N.C. Jan. 16 & Mar. 30, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the

materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

MEMORANDUM OPINION

TILLEY, Chief Judge

This case is now before the Court on Plaintiff's motion [Doc. #62], pursuant to Fed. R. Civ. P. 50(e), to alter, amend, or vacate the Court's Memorandum Opinion of March 30, 2000 [Doc. #59]. For the reasons provided below, this motion is DENIED.

A judgment may be amended by Rule 59(e) to accommodate an intervening change in law; to account for new evidence not available at trial; to correct a clear error of law; or prevent manifest injustice. See *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). Such motions are not designed to "relitigate old matters" or raise novel legal arguments that could have been raised prior to judgment. *Id.* at 404 (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* sec. 2810, at 127-28 (2d ed. 1996)); *Life Advocates, Inc. v. City of Asheville*, No. 1:00CV87, 2000 WL 1804734, at *1 (W.D.N.C. Nov. 3, 2000)

(noting Rule 59(e) is not available for a party "to finish presenting one's case*). Furthermore, reconsideration of a judgment is an "extraordinary remedy which should be used sparingly." *Pacific Ins.*, 148 F.3d at 404 (quoting Wright et al., *supra* sec. 2810.1, at 124).

Plaintiffs raise various arguments in their motion to reconsider. Plaintiffs have failed to show an intervening change in law, new evidence not available at trial, or a clear error of law justifying relief from judgment. Instead, Plaintiffs either re-litigate matters already considered by the Court or raise legal claims which could have been raised in the original summary judgment pleadings. This Court will not consider such legal issues or claims in violation of Rule 59(e), and no manifest injustice results from this decision.

Lastly, Plaintiffs request leave to amend their complaint presumably pursuant to Fed. R. Civ. P. 15(a). Rule 15(a) declares that leave to amend a complaint should be freely given when "justice so requires." The Supreme Court though has noted that such leave need not be freely give when concern exists for "undue delay, bad faith ... of the movant, repeated failure to cure deficiencies ..., undue prejudice to the opposing party, ... [or] futility of the amendment." *Foman v.* Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). Furthermore, most courts have refused to allow amendment of a complaint, once a judgment has been entered, until that judgment has been set aside pursuant to Rule 59 or Fed. R. Civ. P. 60. See 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, sec. 1489, at 692-93 (2d ed. 1990) (citations omitted); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1758 (1985); *Pelzer v. Gamco*. No. 88-2075, 1988 WL 92896, at *2 (4th Cir. (Md.) September 1, 1998).

In this case, a judgment has been entered; the case was dismissed in its entirety by Memorandum Opinion of March 30, 2000. For reasons already presented, this court will not set aside that judgment pursuant to Rule 59(e). Thus, Plaintiffs will not be granted leave to amend their complaint. Furthermore, justice does not require that Plaintiffs be given such an opportunity at this point in the proceedings.

In conclusion, Plaintiffs' motion to reconsider the Court's Memorandum Opinion is DENIED.

This the 16th day of January, 2001.

N. CARLTON TILLEY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.,

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

ORDER

This case is now before the Court on motions by various Defendants to dismiss [Doc. #14] and/or for summary judgment [Docs. #30, 49], and on the Plaintiffs' Motion for Extension of Time [Doc. #48]. For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Order, this case is DISMISSED. Therefore, the Motion for Extension of Time is DENIED as MOOT.

This the 30th day of March, 2000.

N. CARLTON TILLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS E. TILLEY, et al.,

Plaintiffs,

-vs- No. 1:98CV00896

TOWN OF ABERDEEN, et al.,

Defendants.

MEMORANDUM OPINION

TILLEY, Chief Judge.

This case is now before the Court on motions by various Defendants to dismiss [Doc. #14] and/or for summary judgment [Docs. #30, 49]. For the reasons given below, this case is DISMISSED in its entirety.[1]

I.

The Plaintiffs in this matter are Mr. Thomas Tilley and an entity called "Investment Trust." Mr. Tilley is the trustee of Investment Trust, which owns a mobile home park originally located just outside the town limits of Aberdeen, North Carolina. The park has fifty-one sites. In 1986, the Town of Aberdeen annexed some land, including the park. A town

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1. The Plaintiffs' motion for Extension of Time [Doc. #48] is therefore DENIED as MOOT>

ordinance in place at that time apparently required all residences within town limits to be hooked up to the town's sewers, but allowed annexed properties ten years to come into compliance. The park operates on a septic tank system.

Each year between 1989 and 1995, several lots at the park were vacated. A representative of the town apparently told Mr. Tilley that the sites could not be filled until they were hooked up to the town's sewer system. All those lots – about twenty-five of them – remain vacant today. In 1996, a representative of the town allegedly told Mr. Tilley that the vacated spots could not be filled, whether hooked up to the sewer or not, because the park fell within a "commercial highway" zone but was not a conforming use for that zoning classification. The Plaintiffs concede that the park is not a conforming use under the town's current zoning scheme, but they contend that the zoning laws allow nonconforming uses to remain in place until such uses are ceased for six months or more. The park, the Plaintiffs argue, has never ceased operations, so the town cannot legally prevent the filling of the vacant sites.

In 1998, certain officials of the town found the park to be a nuisance. The town also threatened other legal action against the park. That same year, an Environmental Health Specialist with the North Carolina Department of Heath Services, Mr. Samuel Fields, issued a sewage violation notice because some raw sewage was being spilled on the ground in the park. When the sewage leak was fixed, Mr. Fields sent a compliance letter to Mr. Tilley.

The Plaintiffs then filed this suit. They allege that there was a conspiracy to deprive them of their constitutional rights to due process and equal protections, and that the town and its officials took the park without compensation by making it impossible to

operate the park profitably. They also claim that their reputations have been defamed as the park has become a run-down eyesore due to lack of funds with which to keep it in repair. The Complaint requests a jury trial and asks for $300,000 in lost rents, $1,000,000 in punitive damages, a declaratory judgment that the vacant lots can be filled and that the septic system can be used, and fees and costs. The various Defendants have filled motions to dismiss and/or for summary judgment.

II.

The standard for motions to dismiss under Rule 12(b)(6) is well known. "In general, a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993) (citations omitted).

The Town of Aberdeen has also moved to dismiss on ripeness grounds. Such an argument is appropriately made pursuant to Fed. R. Civ. P. 12(b)(1). See, e.g., *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675-76 (2d Cir. 1996). The town contends that the Complaint, on its face, reveals a lack of ripeness given certain ripeness standards for land-use claims. In evaluating such a facial ripeness challenge, the Court must view the Complaint in the light most favorable to the Plaintiffs, just as it does in the 12(b)(6) context. See, e.g., *Carter v. Arlington Pub. Sch. Svs.*, 82 F.Supp.2d 561, 564 (E.D. Va. 2000).

Because, for the reasons set forth below, there is no need to reach the summary judgment motions, it is not necessary to set forth the legal standard applicable to such motions.

III.

The first issue to be addressed is the Plaintiffs' defamation claim. This claim is alleged in paragraph XXXII of the Complaint, which reads in its entirety: "By reason of the conduct of defendants, and each of them, amounting to a taking of Plaintiffs' PROPERTY, Plaintiff [sic] has totally been unable to earn sufficient incomes to keep the park in good repair. This anticipated result of the Defendant's [sic] conspiracy has resulting [sic] in continuing defamation of Plaintiff's [sic] reputation."

It is hornbook law that an action for defamation cannot be maintained in the absence of a defamatory statement published by a third party. See, e.g., *McKeel v. Latham*, 162 S.E. 747, 747 (N.C. 1932); *see generally* 50 Am. Jr. 2d Libel and Slander sec. 235 (1995) ("[P]ublication of the allegedly defamatory matter is an essential element of a cause of action for defamation."). Since the Complaint does not allege any such published statement, the defamation claim is DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).[2]

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2. In any case, the Plaintiffs seem to have abandoned this claim. They did not respond to the Moore County Defendants' motion for summary judgment on the issue, nor does their trial brief mention the claim.

IV.

Next, the Plaintiffs' constitutional claims must be considered. These claims are made pursuant to 42 U.S.C. Section 1983. The Plaintiffs contend that the Defendants deprived them of property without due process of law, took their property without just compensation, and violated the Equal Protection Clause by treating them differently than other property owners.

The Defendants argue that the Plaintiffs' claims are not ripe for adjudication. They rely on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny. *Williamson* involved a takings claim made by a developer whose proposed subdivision was first tentatively approved, then ultimately rejected as contrary to zoning regulations, by a local planning commission. The developer filed suit under section 1983, but the Supreme Court dismissed the case as not ripe, because the developer had neither applied for a variance nor sought to obtain compensation for the supposed taking through inverse condemnation proceedings. *See generally id.* at 186-97.

A prospective plaintiff must seek a variance before coming to court because there is no way to determine whether property has been "taken," in a constitutional sense, until a "final, definitive" decision has been made regarding permissible uses of the land in question. *Id.* at 191; see also *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-53 (1986). Until a variance has been sought, no "final" decision has been made. Similarly, a prospective plaintiff must make use of inverse condemnation proceedings before bringing suit under section 1983 because there is no way to determine if "just compensation" has been provided until just compensation has

been sought. *See id.* at 194-197.

The Plaintiffs have failed to seek a variance or to make use of North Carolina's inverse condemnation statute. See N.C. Gen. Stat. sec. 40A-51. Thus, it appears that their constitutional claims are not ripe.

The Plaintiffs attempt to avoid this conclusion by arguing that they are challenging not only a zoning decision, but also various other actions taken by the Defendants. Even if true, this response misses the point. The *Williamson* doctrine is not limited to municipal zoning cases; rather, it applies in all land-use contexts. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 (1992) (applying *Williamson* in context of statewide ban on coastal development); *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 (1st Cir. 1991) (applying *Williamson* in context of municipal permitting requirement for condominium conversions). Because the Plaintiffs seek to challenge a local land-use decision, *Williamson* applies.

The Plaintiffs also contend that seeking a variance would have been futile and that the requirement that they seek one is therefore excused. They rely on *Lucas* for support, but that was a far different case than the one at bar. In *Lucas*, the Supreme Court declined to dismiss a case on ripeness grounds where (1) the governmental body from which the plaintiff might have requested a variance stipulated that it would not have granted one; (2) the governmental body was apparently not empowered to grant variances, because the land-use regulation at issue was an absolute, statewide ban on coastal construction; and (3) the state supreme court had expressly rejected a ripeness argument. See *Lucas*, 505 U.S. at 1006-12 n. 3. None of these circumstances is present in the instant case. Moreover, even if these circumstances excused the requirement that the Plaintiffs

seek a variance, this case would still not be ripe because the Plaintiffs have not sought compensation by inverse condemnation.

The Plaintiffs might argue that even if their takings, equal protection, and substantive due process claims are not ripe, their procedural due process claim is ripe.[3] The Sixth Circuit, among others, has adopted the view that the *Williamson* requirements do not apply to some procedural due process claims. As that court explained:

> [A] procedural due process claim is instantly cognizable in federal court without requiring a final decision ... from the responsible municipal agency.... [I]n the case of a procedural due process claim, the allegedly infirm process is an injury in itself, whereas, in the context of a taking claim, the alleged injury – a diminution in property value – cannot be assessed with any degree of certainty until the municipality arrives at a final decision as to how the property owner will be permitted to develop his property.

Nasierowski Bros. Inv. co. v. City of Sterling Heights, 949 F.2d 890, 894 (6th Cir. 1991). However, even the Sixth Circuit applies the *Williamson* requirements when the procedural due process claim is bundled together with, and is ancillary to, other constitutional claims. See *Bigelow v. Michigan Dep't of*

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3. The Court assumes, for present purposes, that the Plaintiffs have alleged a procedural due process claim. It is far from clear that they have done so, however. The Complaint does not explicitly discuss procedural due process, and few, if any, of the factual allegations of the Complaint relate to procedural matters.

Natural Resources, 970 F.2d 154, 159-60 (6th Cir. 1992). The cases appear to be uniform that, in such circumstances, procedural due process claims are subject to the *Williamson* requirements. See, e.g., *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 179 (7th Cir. 1996) (quoting *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994); *Taylor Inv., Ltd. v. VGM Corp.*, 983 F.2d 1285, 1291-95 (3d Cir. 1993). Because the Plaintiffs' procedural due process claim is ancillary to their takings, substantive due process, and equal protection claims, it, too, is subject to the *Williamson* requirements.

Because the Plaintiffs have not satisfied the requirements of Williamson, their constitutional claims are DISMISSED for lack of ripeness.

VI.

The Plaintiffs allege that the Defendants have engaged in a civil conspiracy. The Complaint cites 42 U.S.C. Sections 1983, 1985 and refers to a "conspiracy ... to deny and deprive Plaintiff of rights guaranteed to it under the Constitution." (Compl. XXXI.) Therefore, it appears that the Plaintiffs are alleging a civil rights conspiracy, rather than a state-law civil conspiracy.[4] Civil rights conspiracies may be brought under either section

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4. An allegation of a state-law civil conspiracy would likely fail. Such an allegation cannot be maintained absent an underlying state law tort, see, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981) (noting that North Carolina does not recognize civil conspiracy as a separate tort), and the Plaintiffs' only state law tort claim – for defamation – has been dismissed.

1983 or section 1985. Each possibility will be examined in turn.

The Plaintiffs cannot maintain an action under section 1983. Such an action, like any other land-use action brought under section 1983, is subject to the *Williamson* ripeness requirements. See *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088089 (11th Cir. 1996) (applying *Williamson* and finding section 1983 conspiracy claim unripe). Because the Plaintiffs have not met these requirements, they cannot maintain a section 1983 conspiracy claim. If it were otherwise, plaintiffs challenging land-use regulations could circumvent *Williamson* in almost every case simply by tacking on a conspiracy claim.

Similarly, the Plaintiffs cannot maintain an action under section 1985, even assuming that *Williamson* would not bar such a claim. That section is not a general tort statute, nor does it prohibit all conspiracies to deprive citizens of constitutional rights. Rather, it applies only to conspiracies, motivated by racism or other class-based animus, to deprive members of protected groups of constitutional rights in violation of equal protection guarantees. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971); *Jackson v. Cox*, 540 F.2d 209, 210 (5th Cir. 1976). The Plaintiffs make no allegation that they are members of any protected group or that the Defendants conspired against them because of their protected status.[5] As a

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5. The Plaintiffs contend – not in the Complaint, but in later pleadings – that many residents of the park are members of minority groups. They suggest that the Defendants may be conspiring to reduce the stock of housing available to such persons by driving the park out of business. Because this

(continued...)

result, any claim under section 1985 must be dismissed.

VI.

Because no claims remain, this case is DISMISSED in its entirety.

This the 30th day of March, 2000.

N. CARLTON TILLEY
United States District Judge

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5. (...continued)
argument was not raised in the Complaint, it may not properly be before this Court. Regardless, the Plaintiffs do not appear to have standing to pursue it. See, e.g., *Puglisi v. Underhill Park Taxpayer Assoc.*, 947 F. Supp. 673, 692 (S.D.N.Y. 1996), *aff'd*, 125 F.3d 834 (2d Cir. 1997).